INDEX

Subject Index

	Page
Jurisdiction	2
Questions presented	2
Constitutional provisions, statutes and regulations involved	2
Statement	3
Reasons	5
Argument	5
Conclusion	16
Appendix A	17
Opinion	17
Judgment	24
Appendix B	25
Statutes	25
State Rules	26
Regulation	26
Constitutional Provisions	27

Cases Cited

Baltimore and Ohio R. Co. v. United States, 298 U.S. 349, 367-369, 80 L. Ed. 1209 (1936)	14
Brougham v. Blanton Mfg. Co., 243 Fed. 503	15
Crowell v. Benson, 285 U.S. 22, 56-57 (1932)	14
Fletcher v. Veterans Administration, D. C. E.D. Mich., 103 Fed. Supp. 654	12
Lynch v. United States, 292 U.S. 571	12
New York Technical Institute of Maryland, Inc. v. Limburg, D.C. Md., 87 Fed. Supp. 308, 312	12
St. Joseph Stock Yard Co. v. United States, 298 U.S. 38, 52, 'O L. Ed. 1033 (1936)	13

Page

Statutes Cited

Title 28 U.S.C.A., Section 1391(c) 15
Title 38 U.S.C.A., Section 11(a)(2) 3, 12
Title 38 U.S.C.A., Section 705 ..... 3, 12

Texts Cited

67 C.J. 294, Par. 2 11
Department Rules for Approval of Educational Institutions for the Education and Training of Eligible Veterans, May 1, 1949, Page 2, Lines 78-84 6
Instruction No. 1, pursuant to the Independent Appropriation Act, 1950, Public Law 266, 81st Congress, 63 Stat. 631, 653 ..... 3, 4, 6, 9, 10, 12

Constitutional Provisions

Section 10, Article I 2, 4
Amendment V 2, 4, 7
Section 1, Fourteenth Amendment 2, 4, 7

In The

Supreme Court of the United States

October Term, 1955

No. ———

George H. Brasier, PETITIONER,

V.

United States of America; H. V. Higley, Administrator of Veteran Affairs, Veterans Administration, Washington, D.C., Ted Martens Chief of Vocational Rehabilitation, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln, Nebraska, Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln, Nebraska, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

George H. Brasier, the petitioner herein, prays that a writ of Certiorari be issued to review final judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on June 21, 1955, reported at — F. 2d — and appended herein. (App. A)

JURISDICTION.

The judgment of the Court of Appeals was entered on June 21, 1955, a petition for rehearing was duly filed, overruled and mandate issued on August 8, 1955. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254.

QUESTIONS PRESENTED.

1. Did the Plaintiff's contract with the Agents of the State of Nebraska constitute a franchise and a vested property right?

2. Did Plaintiff's contract with the Veterans Administration having been accepted and acted upon constitute a vested property right?

3. Can the holder of such rights be divested of his property therein without compensation or any legal process or proceedings?

4. Can the Congress within the limitations of the Constitution enact legislation authorizing administrative agencies to act in the place of regularly constituted Courts and depriving said Courts of jurisdiction and without formal or other proceedings finally determine the facts and law upon which property rights depend and within their sole discretion terminate said rights?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

The Constitutional provisions involved herein are: Article I, Section 10, the Fifth and Section 1 of the Fourteenth Amendments; the Statutes are Sections

11a-2 and 705 of Title 38 U.S.C.A.; the Regulation is Instruction No. 1, pursuant to the Independent Offices Appropriation Act, 1950, Public Law 266, 81st Congress, 63 Stat. 631, 653. (App. B)

STATEMENT.

Petitioner was the owner and operator of the Lincoln Barber College, located in the City of Lincoln, Nebraska (R. 55,56), doing business principally with the Veterans Administration under a negotiated contract (R. 6-14), formally approved and accepted on September 6, 1949, pursuant to Public Laws 16 and 346, 78 Congress, as amended and to a negotiated franchise (R.14,15) granted by the Superintendent of Public Instruction, State of Nebraska on the 15th day of November, 1948, both stemming from the coordinated efforts of the Veterans Administration and the State Accrediting Agency.

That on the 12th day of September, 1949, the Superintendent of Public Instruction by summary action notified Petitioner his franchise had been withdrawn. And on the 13 day of September, 1949, the Veterans Administration by summary action notified Petitioner his contract had been terminated as of August 24, 1949, and that the action had been coordinated with the State Agency, that students enrolled prior to said date could be retained (R. 57,58).

The contention of the herein Petitioner was that the concerted and coordinated acts of the here concerned Defendants, violated Petitioner's substantive property rights guaranteed by the Federal Constitution; that vested rights had accrued in the Petitioner as to his

franchise and contract and could not be impaired, altered, abolished or taken without due process of law, or just compensation, or as provided by the terms of franchise and contract; that the concerted and coordinated acts of concerned Defendants and the fact that the Federal Goverment had a monopoly of the young men of that period, by reason of Public Laws 16 and 346, 78 Congress, as amended, caused a dearth of enrolled students and the institution collapsed, thereby causing the subsequent spoliation of the entire corpus of Petitioner's institution; that said institution operated the last three months of its existance with a student body of one non-veteran, and complied with all the terms and conditions precedent to said franchise and contract throughout the entire period of said contract; that Petitioner was entitled to compensation in the amount of thirty five thousand four hundred forty dollars, plus costs and attorney fees (R. 57-59).

Petitioner plead in his complaint that the herein action arose under the Constitution of the United States, Section 10, Article I, the Fifth and Section 1 of the Fourteenth Amendments thereof, as against Public Law 266, 81st Congress and the subsequent acts of concerned Defendants pursuant thereto. That the matter in controversy exceeded, exclusive of interest and costs, the sum of three thousand dollars (R. 56).

The District Court, upon hearing Defendants' motion to dismiss, ruled and held that it was without jurisdiction to entertain the suit, and by dicta, that the complaint failed to state a claim against the Defendants upon which relief could be granted, and that the Administrator of Veterans Affairs residing in Washington, D.C., was not subject to suit in the District of

Nebraska. The Appellate Court held that Plaintiff's amended and supplemental complaint was properly dismissed by the District Court.

REASONS.

1. The Courts below in handling this controversy, involving a vital point of Federal Constitutional Law, have decided an important question which has not been, but should be, settled by this Court, not only to correct the injustice wrought in this controversy but to prevent the recurrence of like injustices in similar controversies arising in the future.

2. The decision of the Courts below sanction such a departure from the accepted and usual course of judicial proceedings and considerations as to require the exercise of the supervisory function of this Court's power.

ARGUMENT.

Question one relates to the contract by and between this petitioner and the agents of the Department of Public Instruction, State of Nebraska, and the coordinated efforts of the agents of the Veterans Administration, and the members of the State Barber Board of Examiners, State Department of Health (R. 14,15), to acquire an Institution for the training of eligible veterans in the art and science of barbering.

Petitioner accepted the proffered proposition of the Agents of the various Governments, and in due course and after considerable expenditures, Petitioner received notice of approval which constituted a valid franchise

to train eligible veterans. One of the conditions precedent to the granting of the franchise was the waiving of the one year period of operation before an institution could become eligible for the training of veterans, which had been in force prior to the granting of said franchise, and by virtue of their plenary power had the authority to waive the one year provision—thus Petitioner's institution had been granted a franchise with the status of having been in operation for a period of one year. (State Regulations, lines 78-84). (App. B)

Question two is a continuation of question one and relative to Petitioner's contract with the Veterans Administration (R. 6-14). The Veterans Administration enters into a contract with Petitioner—thus recognizing his institution as having been in operation for a period of one year, by reason of the status of Plaintiff's Institution and by reason of the contract itself. Congress had prior to the formal approval and acceptance of the contract, which was a continuation of a prior contract, enacted into law (August 24, 1949) an Act known as the Independent Offices Appropriation Act, 1950, Public 266, 81st Congress, 63 Stat. 631, which contained a provision, page 653 of 63 Stat., that no part of the appropriation made for education and training under Title II of the Servicemen's Act of 1944 (Public Law 346, 78th Congress), 58 Stat. 287, as amended (see Section 701 [f] of Title 38 U.S.C.A.), should be expended after the effective date of the Appropriation Act, August 24, 1949, "for any veteran for a course in an institution which has been in operation for a period of less than one year immediately prior to the date of this Act".

Petitioner's contract was formally approved and accepted twelve days subsequent to the effective date of Public Law 266 by the home office of the Administrator of Veterans Affairs. Had Petitioner's Institution been considered as not being eligible at that time, surely the contract would not have been forthcoming as it did, twelve days after the effective date of Public Law 266. The administrator had made a decision, he had entered into a binding contract.

Question three concerns the immunity of the foregoing protected contracts against seizure without due process of law or the just payment of compensation therefor, the Fifth and Section 1 of the Fourteenth Amendments of the Federal Constitution prohibits this. Concerning the franchise, the Superintendent of Public Instruction had granted Petitioner a franchise on the 15th day of November, 1948, bestowing upon Petitioner's Institution the status of being in operation for a period of one year in order to qualify said institution for the purpose of training eligible veterans. The Veterans Administration sanctioned this approval along with the members of the State Barber Board by their coordinated efforts in enticing Petitioner to establish said institution for the express purpose of training eligible veterans. The Petitioner had accepted the proffered proposition, established the institution at considerable expense, qualified in every respect, except being in operation for a period of one year, which was mutually excepted and waived by the coordinators approving said institution, then, subsequently the Veterans Administration recognizing the status of said institution—the Lincoln Barber College, entered into contracts, the last one being accepted and approved twelve

days subsequent to the effective date of said Public Law 266, clearly establishing the fact that Petitioner's institution was eligible under said Public Law 266 to train eligible veterans.

The Appellate Court in affirming the judgment of the District Court stated:

> "We are satisfied that the plaintiff acquired no vested right to have his school remain an approved and accredited school for the training of veterans. His contract called for the training of eligible veterans, and it is apparent that on August 24, 1949, Congress withdrew the eligibility of veterans for training at plaintiff's school, excepting those already enrolled * * *. The termination of the contract in suit by the Veterans' Administration was not subject to review, and did not, in our opinion, constitute a taking of plaintiff's property without just compensation or without due process of law * * *. His termination of the contract, we think, did not give rise to any actionable right to enforcement of the contract or to damages for its termination. We think it makes no difference whether the contract became fully effective on August 8, 1949, before the enactment of Public Law 266, 81st Congress, or on September 6, 1949, after the enactment of that law * * *."

It is the contention of this Petitioner that Congress did not withdraw the eligibility of veterans for training at plaintiff's (Petitioner's) institution, the subordinate Officers of the Veterans Administration and the Superintendent of Public Instruction, by their coordinated and concerted acton in withdrawing the franchise and the subsequent termination of the contract, did so, pursuant to the promulgation of the Adminis-

trator of Veterans Affairs Instruction No. 1, dated September 8, 1949:

"Veterans Administration Instruction No. 1

Washington, 25, D. C. September 8, 1949

Public Law 266, 81st Congress

Application of the Provisions of Public Law 266, 81st Congress, Prohibiting Expenditures of Government Funds for Courses of Education to Training Until Certain Requirements are Met.

3. Policy.

a. Institutions in Operation Less Than One Year.

(2) For the purpose of Public Law 266, 81st Congress, an institution is defined as a school when it operates in one location. A subsidiary, branch or extension of an existing school in the same or different community will be considered as a separate institution. In determining whether a school has been in operation for a period of less than one year, the effective date of operation will be the date on which a full schedule of instruction was commenced by the school to a minimum of 25 students for which the school collected tuition. The school must have been in continuous operation under substantially the same ownership and management for a full twelve month period including reasonable vacation and holiday periods and must have provided to a minimum of 25 students during that full twelve months period the course or courses of substantially the same length and character as those offered following the twelve months period."

The Administrator under the above policy had enlarged upon Public Law 266 to the extent that even though an institution had been in operation or recognized as being in operation for a period of one year, the

institution could not be recognized as such, until such time as the institution maintained a full schedule of instruction to a minimum of 25 students for a period of one year.

At this point it is necessary to reiterate to get a digest of the foregoing before going into the law pertaining to the facts. The facts are as follows:

1. Petitioner was granted a franchise bestowing upon his institution the status of being in operation for a period of one year, the Veterans Administration sanctioned the granting of the franchise by their coordinated actions with the State Approving Agency.

2. The Veterans Administration again sanctioned the franchise by entering into contracts with Petitioner, and on the contract here concerned the Administrator either recognized the Petitioner's institution as having been in operation for a period of one year or waived the law under Public Law 266, 81st Congress, as the contract was formally approved and accepted twelve days subsequent to the effective date of that law.

3. Two days subsequent to the formal approval and acceptance of the contract with Petitioner, the Administrator of Veterans Affairs issued Instruction No. 1, pursuant to Public Law 266, defining institutions in operation less than one year.

4. Four days subsequent to the effective date of Instruction No. 1, Petitioner was notified by the Superintendent of Public Instruction that his franchise had been withdrawn.

5. One day subsequent to the withdrawal of Petitioner's franchise, the Veterans Administration notified him that his contract had been terminated, but could retain those enrolled before August 24, 1949, and that the action had been coordinated with the State Accrediting Agency.

The actions of the concerned Defendants in withdrawing Petitioner's franchise and contract were stated by both of the lower Courts to be pursuant to Public Law 266, 81st Congress. Petitioner has attempted to disprove this fact and contends that vested rights had accrued by reason of the granting of the franchise and the subsequent contracts. Defendants were estopped by their decisions to withdraw the franchise and contract according to the Doctrine of Waiver, what is said in 67 C. J. 294, Par. 2 is contended to be recognized by the law. It is to the effect that:

> "a person with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another."

The Defendants here concerned did not act pursuant to Public Law 266, as said Law did not disqualify Petitioner's institution nor did it disqualify veterans from enrolling in said institution. However Instruction No. 1 did disqualify Petitioner's institution by the enlargement of Public Law 266 by the Administrator, which in effect created an impossibility to be performed by institutions who were of the status of being in operation for a period of one year, but who had not maintained a minimum of 25 students for a twelve months period. There can be no question, that where the Veterans Administration had a monopoly of the young

men of that period, that Petitioner's institution could ever comply with Instruction No. 1, relying upon non-veterans.

Question four concerns the constitutionalty of Title 38 U.S.C.A. Sections 11a-2 and 705. (App. B) The lower courts intimated that no distinction existed between the instant controversy and the following cases cited: *New York Technical Institute of Maryland, Inc.* v. *Limburg,* D.C.Md., 87 Fed. Supp. 308, 312; *Fletcher* v. *Veterans Administration,* D.C. E.D.Mich., 103 Fed. Supp. 654; and *Lynch* v. *United States,* 292 U.S. 571.

Petitioner respectfully submits that the only case in point with the instant controversy is *Lynch* v. *United States,* supra; Justice Brandeis distinguishes between contracts and gratuities. We quote in part as follows:

> "Penisons, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits confered by gratuities may be redistributed or withdrawn at any time in the discretion of Congress * * *."

Petitioner believes the above conclusion of law is sound in that it does not involve agreement of parties, however in the instant controversy there was an agreement of parties and rights did become vested, subject to Acts of Congress and the right of the Administrator to terminate for cause by giving sixty days notice. This he did not do. These were provisions that were part of the contract, but when the Administrators of the various Governments attempt to enlarge upon the law or act in pursuance of the enlargement that create impossibilities to be performed that are not a part of

the conditions precedent to said franchise and contract, but are direct violations of their contractual agreements, then they are operating outside of their express authority and are subject to the jurisdiction of Constitutional correction, by proper courts.

Justice Brandeis goes on to say that:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a State, or the United States, rights against the United States arising out of a contract with it are protected by the Fifth Amendment. When the United States enters into contract relations, its rights and duties therein are governed generally by law applicable to contracts between private individuals."

The above supports Petitioner's contention that the authority vested in the Administrator, where contractual obligations are concerned, are no greater than those of an individual or corporation doing business by contractual agreements interstate. He is subject to the same laws and to the same jurisdiction of the courts as ordinary citizens. To avoid constitutional inhibitations he must stay within the confines of his own orbit Congress has provided as his exclusive province, and for the courts here concerned to hold to the contrary, must be based upon error as to the facts, surely statutes are not to be construed above the supreme law. It is the former that Petitioner is basing his contentions in argument; however, as an alternative Petitioner cites the following cases, to wit:

In *St. Joseph Stock Yard Co.* v. *United States*, 298 U.S. 38, 52, 'O L. Ed. 1033 (1936), pertaining to ad-

ministrative bodies of finality of fact-determination, the court had this to say:

> "But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, * * * is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

In *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 367-369, 80 L. Ed. 1209 (1936), where the court said that where property is being taken for public use and the owner invokes the just compensation clause, "he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

And in *Crowell* v. *Benson,* 285 U.S. 22, 56-57 (1932), Chief Justice Hughes elaborated in fusing the due process clause of the Fifth Amendment with Article III:

> "* * *whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency * * * for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." To do so, contended the Chief Justice, "would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system, wherever constitutional rights depend, as not infrequently they do depend, upon the facts, and finality as as to the facts becomes in effect finality in law."

A subsidiary question relating to the main questions herein, supra, is whether the Administrator, having his subordinate within the jurisdiction of the District Court acting pursuant to his promulgations, and who it is alleged has violated the vested property rights of Petitioner, be subject also to the same jurisdiction.

It is the contention of Petitioner that the Administrator being joined as a co-defendant with his subordinate, who, being within the jurisdiction doing business pursuant to the promulgations of the Administrator, should be treated the same as corporations under Title 28 U.S.C.A. 1391 (c). There is no foundation to treat him otherwise.

We believe what is said in *Brougham* v. *Blanton Mfg. Co.*, 243 Fed. 503, will in the least give some light on the question here concerned:

> "It is first contended by the appellant that no injunction could rightly have been granted against the appellants, because such an injunction could not have been properly granted against the Secretary of Agriculture. In St. Louis Independent Packing Co. v. Hon. David F. Houston, 242 Fed. 337, we recently had occasion to fully examine this question, and following that case we hold that this injunction could properly have been issued against the Secretary of Agriculture, had he been served or appeared, and he not being within the jurisdiction of the court, but having his subordinates there, who, it was alleged, were violating the law or about to violate it, upon a proper showing an injunction could issue against them."

CONCLUSION.

In summary Petitioner respectfully submits that a conflict exists between the actual facts of the instant controversy and the holding of the Appellate Court, and or between the United States Codes involved herein and the constitutional prohibitations of the Federal Constitution of the United States. That the petition for writ of certiorari ought to and should be granted.

Respectfully submitted,

GEORGE H. BRASIER,
Pro se,
HERBERT W. BAIRD,
138 N. 12th Street,
Lincoln 8, Nebraska.
Counsel for Petitioner.

APPENDIX A

Opinion

United States Court of Appeals

For the Eighth Circuit

No. 15,283.

George H. Brasier, APPELLANT,

V.

United States of America; H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D.C.; Ted Martens, Chief of Vocational Rehabilitation and Education Division, Veterans Administration, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln, Nebraska; Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska; and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln, Nebraska, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

[June 21, 1955.]

Herbert W. Baird for Appellant.

William C. Spire, Assistant United States Attorney (Donald R. Ross, United States Attorney, was with him on the brief), for Appellees, United States of America, H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D.C., and Ted Martens, Chief of Vocational Rehabilitation and Education Division, Veterans Administration, Lincoln, Nebraska.

Robert V. Hoagland, Assistant Attorney General of the State of Nebraska (Clarence S. Beck, Attorney

General of the State of Nebraska, was with him on the brief), for Appellees, Freeman B. Decker, Superintendent of Public Instruction, Lincoln, Nebraska, Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska, and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln, Nebraska.

Before SANBORN, WOODROUGH and VOGEL, Circuit Judges.

SANBORN, Circuit Judge.

This is an appeal from a judgment dismissing the amended and supplemental complaint of the plaintiff (appellant) in an action brought by him, as the owner of the Lincoln Barber College, against the defendants (appellees) to recover damages resulting from the alleged repudiation of his contract with the Veterans' Administration for the training of eligible veterans in barbering. The contract was entered into under Public Laws 16 and 346, 78th Congress, as amended.

The District Court, in ruling upon motions of the defendants to dismiss, held that it was without jurisdiction, that the complaint failed to state a claim against the defendants upon which relief could be granted, and that the Administrator of Veterans' Affairs residing in Washington, D.C., was not subject to suit in the District of Nebraska.

The facts deducible from the complaint as amended and supplemented may be summarized as follows: The plaintiff was the owner and operator of the Lincoln Barber College in Lincoln, Nebraska, which, pursuant to 38 C.F.R. § 21.418(a) and (b), received State approval for the training of veterans on November 15,

1948. The Veterans' Administration on August 8, 1949, contracted with the Lincoln Barber College for the training of eligible veterans, at Government expense, for the period of one year from July 1, 1949. The plaintiff asserts that the contract was not formally approved until September 6, 1949. By its terms, the contract was terminable by the Veterans' Administration at any time upon sixty days notice, *but was not so terminated.* The contract contained a provision "that any obligation assumed by the Veterans Administration under this contract is limited to the appropriated funds made available therefor." State approval of the plaintiff's school for the training of veterans was withdrawn on September 12, 1949, and the Veterans' Administration on September 13, 1949, terminated the approved status of the plaintiff's school for the training of veterans not already enrolled as of August 24, 1949. These administrative actions were taken pursuant to the Independent Offices Appropriation Act, 1950, Public Law 266, 81st Congress, 63 Stat. 631, which contained a provision, page 653 of 63 Stat., that no part of the appropriation made for education and training under Title II of the Servicemen's Readjustment Act of 1944 (Public Law 346, 78th Congress), 58 Stat. 287, as amended (see §701(f) of Title 38 U.S. C.A.), should be expended after the effective date of the Appropriation Act, August 24, 1949, "for any veteran for a course in an institution which has been in operation for a period of less than one year immediately prior to the date of enrollment in such course unless such enrollment was prior to the date of this Act." The official action taken by the defendants pursuant to the Appropriation Act, Public 266, made it impossible for the plaintiff to operate his school, which evi-

dently had, on August 24, 1949, a dearth of enrolled veterans, and the school "collapsed".

It is the theory of the plaintiff that his contract with the Veterans' Administration was property, and that the termination and frustration of that contract by the acts of the defendants constituted the taking of such property without just compensation and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. He contends, therefore, that he had a claim upon which relief could be granted, and that the District Court, under Section 1331 of Title 28 U.S.C.A., had jurisdiction of his action as one arising under the Constitution of the United States for damages alleged to be in excess of $3,000.

It is clear that whatever right or privilege the plaintiff had under his contract with the Veterans' Administration to educate and train veterans not already enrolled in his school was *terminated* by a *decision of* the *Administrator* of Veterans' Affairs for the reason that Congress had refused to authorize the payment of tuition for the training of any veteran not already enrolled at the school on August 24 1949. It is also clear that, by the terms of the contract, the obligation of the Veterans' Administration to pay the plaintiff tuition for veterans not enrolled before August 24, 1949, ceased as of that date.

We are satisfied that the plaintiff acquired no vested right to have his school remain an approved and accredited school for the training of veterans. His contract called for the training of eligible veterans, and it is apparent that on August 24, 1949, Congress withdrew the eligibility of veterans for training at the plain-

tiff's school, excepting those already enrolled. The plaintiff could have no greater rights to be paid tuition for training veterans than Congress authorized. The education and training provided by Congress for veterans, at Government expense, were obviously for their benefit and not for the benefit of the schools which might be selected by the Veterans' Administration to educate and train them. *New York Technical Institute of Maryland, Inc.* v. *Limburg*, D.C.Md., 87 F. Supp. 308, 312. We are in complete accord with the view expressed by Judge Chestnut in that case, and by the District Court in the instant case, "that the provision for educational and vocational training to veterans is in the nature of a gratuity, as are pensions, that may be granted or withheld in the wisdom of Congress. * * * Such gratuities are, of course, quite different from veterans' contractual rights under war risk insurance policies. *Lynch* v. *United States*, 292 U.S. 571, 577."

(The decision to terminate the plaintiff's contractual privilege to train veterans not enrolled prior to August 24, 1949, was an *administrative decision* of the Administrator of Veterans' Affairs.) As such it was final and conclusive and not subject to review. The District Court was without jurisdiction to overrule, override or disregard the decision. Section 11a-2 of Title 38 U.S.C.A., so far as here pertinent, provides that "the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions."

Appendix

Section 705 of Title 38 U.S.C.A. provides that "All decisions rendered by the Administrator of Veterans' Affairs under the provisions of Sections 701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title [relating to vocational rehabilitation and to other benefits for veterans] or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

These statutory provisions clearly deprive a District Court of the United States of jurisdiction over a case based upon the claim that a decision of the Administrator of Veterans' Affairs improperly terminated or rendered ineffective a contract for the training of veterans.

There is no controlling distinction between this case and *Fletcher* v. *Veterans Administration*, D.C. E.D. Mich., 103 F. Supp. 654, in which Judge Thornton dismissed, for lack of jurisdiction, a similar claim, because of the statutory provisions above quoted.

We conclude that Congress has vested in the Veterans' Administration the *exclusive right to determine* the veterans who are eligible to the benefits of education and vocational rehabilitation provided by Congress; to designate the institutions and schools in which they may be trained; and to withdraw veterans from any institution which can be, or is, no longer approved for their training.

The termination of the contract in suit by the Veterans' Administration was not subject to review, and

did not, in our opinion, constitute a taking of the plaintiff's property without just compensation or without due process of law. The contract was subject to the exercise of the powers conferred by Congress upon the Administrator of Veterans' Affairs relative to the education and training of veterans. His termination of the contract, we think, did not give rise to any actionable right to enforcement of the contract or to damages for its termination. We think it makes no difference whether the contract became fully effective on August 8, 1949, before the enactment of Public Law 266, 81st Congress, or on September 6, 1949, after the enactment of that law. It is inconceivable to us that officials of a State agency and of the Veterans' Administration having to do with the education and training of veterans under Congressional authority and at Government expense, can become liable for damages, either personally or officially, for acts performed pursuant to law in the line of their duty under circumstances such as those upon which the plaintiff's claim is based.

The Administrator of Veterans' Affairs, who was domiciled in the District of Columbia, was not subject to suit in the District of Nebraska. Section 1391(b) of Title 28 U.S.C.A., *Blackmar* v. *Guerre*, 342 U.S. 512, 516.

It is our conclusion that the plaintiff's amended and supplemental complaint was properly dismissed on the grounds and for the reasons stated by the District Court.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Judgment

United States Court of Appeals
for the
Eighth Circuit

No. 15283 September Term, 1954.

Tuesday, June 21, 1955.

George H. Brasier, Appellant,

V.

United States of America; H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D.C.; Ted Martens, Chief of Vocational Rehabilitation and Education Division, Veterans Administration, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln, Nebraska; Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska; and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln, Nebraska.

This cause came on to be heard on the record from the United States District Court for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

June 21st, 1955.

APPENDIX B

Statutes

Title 38 U.S.C.A., Section 11(a)(2):

"Notwithstanding any other provisions of law, except as provided in Sections 445 and 817 of this title[2], the decisions of the Administrator of Veterans Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions."

Title 38 U.S.C.A., Section 705:

"All decisions rendered by the Administrator of Veterans Affairs under the provisions of Sections 701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 720 and 721 of this title or the regulations issued pursuant thereto, shall be final and conclusive upon all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

---

[2] The exception noted can not avail the plaintiff. Section 445 has to do with the procedure in relation to disputed claims and Section 817 to suits arising over disputes concerning National Service Life Insurance in which judicial review is expressly allowed and the manner of seeking it provided.

State Rules

Department Rules for Approval of Educational Institutions for the Education and Training of Eligible Veterans, May 1, 1949, Page 2, Lines 78-84.

Since it is common practice that accrediting agencies will not accredit new schools at their opening, and since the employability of graduates cannot be ascertained at the time of a school's opening, no school is approved until it is operating smoothly and has proven its ability to do a creditable job, or has been licensed by another agency of state. (A new school is required to be in successful operation for a period of one year or longer before it is eligible for approval, unless it has been licensed earlier by another agency of state.)

Regulation

Instruction No. 1, pursuant to the Independent Appropriation Act, 1950, Public Law 266, 81st Congress, 63 Stat. 631, 653:

"3. Policy.

a. Institutions in Operation Less Than One Year.

(2) For the purpose of Public Law 266, 81st Congress, an institution is defined as a school when it operates in one location. A subsidiary, branch or extension of an existing school in the same or different community will be considered as a separate institution. In determining whether a school has been in operation for a period of less than one year, the effective date of operation will be the date on which a full schedule of instruction was

commenced by the school to a minimum of 25 students for which the school collected tuition. The school must have been in continuous operation under substantially the same ownership and management for a full twelve month period including reasonable vacation and holiday periods and must have provided to a minimum of 25 students during that full twelve months period the course or courses of substantially the same length and character as those offered following the twelve months period."

Constitutional Provisions

Section 10 Article I:

"No State shall * * * pass any Bill of Attainer, ex post facto Law, or Law impairing the Obligation of Contracts * * *."

Amendment V:

"* * * nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1, Fourteenth Amendment:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In The

United States Court of Appeals

EIGHTH CIRCUIT

September Term 1954.

No. 15,283.

CIVIL.

George H. Brasier, APPELLANT,

V.

United States of America; H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D. C.; Ted Martens Chief of Vocational Rehabilitation and Education Division, Veterans Administration, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln Nebraska; Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln Nebraska, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.
Hon. John W. Delehant, District Judge.
Filed February 5, 1955.

PETITION FOR REHEARING.

GEORGE H. BRASIER,
Pro se,
HERBERT W. BAIRD,
138 N. 12th Street,
Lincoln, Nebraska,
Attorneys for Appellant.

PETITION FOR REHEARING.

Comes now the appellant, George H. Brasier, pro se, and moves the court to vacate its opinion and judgment in the above entitled cause and to grant a rehearing en banc on the merits for the following reasons as hereinafter set forth.

In the event this petition is overruled the appellant requests the mandate be witheld for 60 days from the date of said ruling in which appellant may apply for and prepare a record for appeal to the Supreme Court of the United States of America.

REASONS.

1. The court erred in overlooking the fact that appellant specifically pleaded in his complaint to-wit: (R., p. 56).

> "Further, this action arises under the Constitution of the United States, Section 10, Article I, the Fifth and Section 1 of the Fourteenth Amendments thereof, as against Public Law 266, 81st Congress and the subsequent acts of the Defendants, as herein more fully appears."

Conclusions of law in support of above:

In *Heald* v. *District of Columbia,* 254 U. S. 20, 23 (1920) it was held in effect that the right to pass on the constitutional power of Congress draws to it the authority also to decide all the essential incidents, even though there might not be a right to consider them.

In *Marbury* v. *Madison,* 1 Cr. 137, 178 (1803) Justice Marshall said:

> "If the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case which both apply."

In *Osborn* v. *Bank of United States,* 9 Wheat. 738, 819, 823 (1824) it was held in effect that where Federal jurisdiction is dependent upon the charactor of the cause, it is sufficient that one of the ingredients is a question to which the judicial power is extended by the Constitution, and it is immaterial that other questions of law and fact are involved.

2. The court erred in overlooking the fact that judicial power and duty under Article III, Section 2, Clause 2 is equated with the due process clauses of the Fifth and Fourteenth Amendments of the Federal Constitution; that appellant specifically pleaded in his complaint to-wit:(R., p. 58).

> VII. "The deprivation of franchise and contract, which is in effect, a taking of property without just compensation and without due process of law and violates the Fifth and Fourteenth Amendments of the Constitution of the United States."

Conclusion of law in support of above:

In *Crowell* v. *Benson,* 285 U. S. 22; 56-57 (1932) Chief Justice Hughes elaborated:

> "* * * whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative

agency * * * for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." To do so, contended the Chief Justice, "would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system, wherever constitutional rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

For further conclusions of law on this point see reply brief of appellant, page 3. Appellant makes same a part hereof by reference.

3. The court erred in overlooking the fact that Sections 11a-2 and 705 of Title 38 U. S. C. A. have never at any time been controverted by the herein appellant (R., p. 59).

See conclusions of law referred to on pages 7, 8 and 9 of appellant's original brief. Appellant makes same a part hereof by reference.

4. The court erred in overlooking the fact that an attempt has been made by this honorable court to adjudicate and determine the instant controversy against the herein appellant without benefit of due process of law i. e., a full hearing that includes the right to introduce evidence, in fact a complete trial. Appellant is prepared to prove by conclusive evidence that the appellees, both Federal and State, violated appellant's vested rights guaranteed by the Federal Constitution.

The evidence will show conclusively that appellant's institution was formally approved as being an institution

in operation for a period of one year in order to qualify said institution to train eligible veterans. This occured on November 15, 1948, by the coordinated efforts of the Veterans Administration, Federal Appellees and the Department of Public Instruction, State Appellees, subsequently the Veterans Administration entered into a valid contract with appellant on the 17th day of January, 1949, covering a period from January 15, 1949, to June 30, 1949, then extended said contract on the 6th day of September, 1949, to cover a period from July 1, 1949 to June 30, 1950. The evidence will conclusively show many other violations of appellant's vested rights. What the appellant wants and needs is soley jurisdiction guaranteed by the law of the land (R., p. 14; R., p. 56; R., pp. 6-14).

5. The court erred in overlooking the fact that the Administrator of Veterans Affairs, "had he been served or appeared, and he not being within the jurisdiction of the court, but having his subordinates there, who, it was alleged, were violating the law or about to violate it, upon a proper showing an injunction could issue against them."

Brougham v. *Blanton Mfg. Co.*, 243 Fed. 503 (This Court).

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 466

GEORGE H. BRASIER, PETITIONER

v.

UNITED STATES OF AMERICA; H. V. HIGLEY, Administrator of Veterans' Affairs, Veterans' Administration, Washington, D. C.; TED MARTENS, Chief of Vocational Rehabilitation, Lincoln, Nebraska; FREEMAN B. DECKER, Superintendent of Public Instruction, Lincoln, Nebraska; WAYNE O. REED, Former Superintendent of Public Instruction, Lincoln, Nebraska; and OTTO G. RUFF, Former Supervisor of Veterans' Education, Lincoln, Nebraska

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS THE UNITED STATES, H. V. HIGLEY, AND TED MARTENS, IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the District Court (R. 26-40, 61-63) are not reported. The opinion

of the Court of Appeals (Pet. App. 17-23) is reported at 223 F. 2d 762.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1955 (Pet. App. 24). A petition for rehearing was denied on July 27, 1955. The petition for a writ of certiorari was filed on October 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court, as affirmed by the Court of Appeals, properly held that it lacked jurisdiction to entertain petitioner's complaint.

2. Whether the District Court and Court of Appeals correctly determined that the Veterans' Administration's withdrawal of approved status of petitioner's school did not contravene the terms of the contract between the two parties.

3. Whether the District Court and the Court of Appeals properly held that the Administrator of Veterans' Affairs was not subject to suit in the District of Nebraska.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Independent Offices Appropriation Act, 1950, 63 Stat. 631, 653; the Act of October 17, 1940, 54 Stat. 1193, 1197, 38 U.S.C. 11a-2; the Act of March 20, 1933, 48 Stat. 8, 9, 38 U.S.C. 705; and Veterans' Administration Instruction No. 1 of September 8, 1949, 14 F.R. 5593, 38 C.F.R. 21.690, are set forth in the Appendix, *infra*, pp. 11-13.

STATEMENT

Petitioner, George H. Brasier, as the owner of Lincoln Barber College, brought this action in the United States District Court for the District of Nebraska. He joined as defendants the United States, H. V. Higley, the Administrator of Veterans' Affairs, Ted Martens, a Veterans' Administration official, and various Nebraska public officials, all of whom are respondents in this Court. Petitioner sought to recover damages from respondents resulting from the alleged repudiation of a contract with the Veterans' Administration for training eligible veterans to become barbers. On November 19, 1954, the District Court, pursuant to its prior memorandum opinions (R. 26-40, 61-63), dismissed petitioner's amended and supplemental complaint (R. 63-64). On appeal, the Court of Appeals for the Eighth Circuit unanimously affirmed (Pet. App. 24).

The relevant facts, as appearing from the complaint, as amended and supplemented, may be summarized as follows:

Petitioner was the owner and operator of the Lincoln Barber College in Lincoln, Nebraska (R. 55). On November 15, 1948, the school received approval by the Department of Public Instruction, State of Nebraska, of a proffered course in barbering to eligible veterans under the Servicemen's Readjustment Act of 1944, 58 Stat. 284, 38 U. S. 693, *et seq.*, as amended (R. 56-57). Subsequently, on August 8, 1949, the Veterans' Adminis-

tration contracted with the school for the training of eligible veterans at Government expense from July 1, 1949, to June 30, 1950 (R. 7).[1]

The contract, a copy of which was attached to the complaint, contained the following provision (R. 13):

> Article 7. Limitation
>
> It is understood and agreed that the terms of this contract are subject to and will be governed by, Veterans Administration regulations issued pursuant to Public Laws 16 and 346, as amended, and that any obligation assumed by the Veterans Administration under this contract is limited to the appropriated funds made available therefor.

On August 24, 1949, Congress enacted Public Law 266, the Independent Offices Appropriation Act, 1950, which provided that no part of the appropriation made for education and training under Title II of the Servicemen's Readjustment Act of 1944 should be expended after the effective date of the Appropriation Act "[f]or any veteran for a course in an institution which has been in operation for a period of less than one year immediately prior to the date of enrollment in such course unless such enrollment was prior to the date of this Act" (App. *infra*, pp. 11-12).

---

[1] The contract is dated August 8, 1949; however, petitioner claims that it was not formally approved by the Veterans' Administration until September 6, 1949 (R. 57).

Thereafter, on September 12, 1949, State approval of petitioner's school for the training of veterans was withdrawn (R. 2-3), and on September 13, 1949, the Veterans' Administration terminated the approved status of the school for training veterans not already enrolled as of August 24, 1949 (R. 3).[2] The complaint states that petitioner continued throughout the term of his contract to operate the barber college, notwithstanding the small number of students in attendance, but that the college then collapsed for lack of students (R. 58). This absence of students was attributed by the complaint to the impact of Public Law 266 and the consequent action of the defendants (R. 58).

On May 5, 1954, petitioner filed this action in the District Court for the District of Nebraska alleging that the removal of his approved status by the various Federal and State officials named as defendants, acting in concert under the impetus of Public Law 266, constituted, among other things, an impairment of the obligation of his contract with the Veterans' Administration and a taking of his property without just compensation and in violation of due process of law (R. 1-6). The complaint, as subsequently supplemented and amended, sought $10,000 in damages from the United States and the other Federal defendants, and $25,440 from the defendant State officials, for the damages allegedly incurred (R. 59). Defend-

[2] Although it is only suggested in his complaint, petitioner now concedes that his school had not been in operation for a period of one year prior to August 24, 1949 (Pet. 7).

ants moved to dismiss for (1) lack of jurisdiction, (2) improper venue as to the Administrator of Veterans' Affairs, and (3) failure of the complaint to state a claim upon which relief could be granted (R. 59-60).

On November 19, 1954, the District Court, pursuant to its prior memorandum opinions (R. 26-40, 61-63), dismissed the complaint (R. 63-65). Citing 38 U.S.C. 11a-2 and 38 U.S.C. 705 (App. *infra*, p. 11), the court stated that it was precluded by statute from reviewing the federal administrative action complained of, and thus lacked jurisdiction to entertain petitioner's complaint (R. 33-36).[3] Moreover, the court stated, Article 7 of the contract between petitioner and the Veterans' Administration (*supra*, p. 4) sustained the termination of the contract, which resulted from the appropriations limitation contained in Public Law 266 (R. 34). With respect to respondent Higley, the Administrator of Veterans' Affairs, the court ruled that his official station was in the District of Columbia, and that venue was improperly laid in Nebraska (R. 37). On appeal, the judgment of the District Court was affirmed for essentially the same reasons given by the lower court (Pet. App. 17-23).

ARGUMENT

Both the District Court and the Court of Appeals found jurisdictional and venue barriers to petitioner's suit and observed, in addition, that his

[3] The court held that this lack of jurisdiction extended to the named State defendants as well (R. 38-39).

claim on the merits was baseless. These rulings are eminently correct; no unresolved matter of importance is presented; and there is no occasion for further review.

1. Apart from the total lack of substance to petitioner's claim when considered on its merits (*infra*, pp. 8-10), it is evident at the outset that the District Court lacked jurisdiction to entertain his suit. The gravamen of petitioner's complaint is the decision of respondent Administrator of Veterans' Affairs to withdraw the approved status of petitioner's school for the training of veterans who were not enrolled as of August 24, 1949. This decision of the Administrator was squarely within the purview of both 38 U. S. C. 11a-2 and 38 U. S. C. 705 (App. *infra*, p. 11).[4] By the express terms of those provisions, the Administrator's decision was final and conclusive upon all questions of law and fact, and jurisdiction to review by any court of the United States was precluded. This statutory withdrawal of jurisdiction barred consideration of petitioner's claim by the District Court and necessitated its dismissal. See *Lynch* v. *United States*,

---

[4] 38 U.S.C. 11a-2 (App. *infra*, p. 11) covers all decisions of the Administrator except those arising out of disagreements as to claims under Government insurance contracts. 38 U.S.C. 705 (*ibid.*) applies only to specified statutory provisions administered by the Veterans' Administration. The vocational rehabilitation and educational and training programs of World War II veterans fall within 38 U.S.C. 705. See 38 U.S.C. 697(a), 701(f), and 38 U.S.C. Ch. 12A, Reg. 1(a); *Fletcher* v. *Veterans Administration*, 103 F. Supp. 654, 656 (E.D. Mich.); *New York Technical Institute of Maryland* v. *Limburg*, 87 F. Supp. 308, 310 (D. Md.).

292 U. S. 571, 580-587; *Fletcher* v. *Veterans Administration,* 103 F. Supp. 654 (E. D. Mich.).

An additional obstacle is interposed with respect to the joining of respondent Higley, Administrator of Veterans' Affairs, as a defendant below. The Administrator's official residence is in the District of Columbia and he was not subject to suit in the District of Nebraska. *Blackmar* v. *Guerre,* 342 U. S. 512, 516.

2. Examination of petitioner's claim on its merits yields no different result. His grounds for relief are negatived by the terms of the very contract upon which he relies. Article 7 of the contract of August 8, 1949, between petitioner and the Veterans' Administration (*supra,* p. 4), specifically provided that any obligation assumed by the latter "under this contract is limited to the appropriated funds made available therefor." Congress, by the Independent Offices Appropriation Act, enacted August 24, 1949 (App. *infra,* pp. 11-12), directed that no part of the appropriation for veterans' training under the Servicemen's Readjustment Act of 1944 could be expended after the date of the Act "[f]or any veteran for a course in an institution which has been in operation for a period of less than one year immediately prior to the date of enrollment in such course unless such enrollment was prior to the date of this Act". The Veterans' Administration followed the mandate of that Act in its consequent actions with respect to petitioner's school. His contract rights being expressly subject to future appropriations by Con-

gress, petitioner can assert no grounds for relief.

Although there is much equivocation on his part, petitioner does concede at one point that his school had not been in operation for one year prior to August 24, 1949 (Pet. 7). He attempts to circumvent this disqualifying circumstance by his claim that the Veterans' Administration "waived" (Pet. 7) the one-year requirement by formally approving the contract after enactment of the Appropriation Act (Pet. 7-8). It is obvious, however, that irrespective of when administrative ratification of this contract finally came, the Veterans' Administration could not waive the statutory requirement. Cf. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380, 384.

Petitioner's contention that Veterans' Administration Instruction No. 1, 14 F. R. 5593 (App. *infra,* pp. 12-13), issued subsequent to the Appropriation Act and requiring a student enrollment of twenty-five in defining "operation" for one year, was an unwarranted extension of the Act is similarly devoid of merit. Irrespective of that regulation, petitioner's school, by his own admission (Pet. 7), had not been in operation for the requisite year prior to August 24, 1949, the date of the enactment of the Appropriation Act. In providing the one year restriction, Congress was intent on preventing the dissipation of funds it was appropriating for veterans' training to fly-by-night schools, and to schools which came into existence solely to take advantage of the veterans' educational program but had no background of experience to offer. The

CERTIFICATE.

George H. Brasier, pro se, hereby certifies the above is restricted to Rule 15 of the Revised Rules of this court and is for the purpose of obtaining **justice** and not for the purpose of delay.

Respectfully submitted,

GEORGE H. BRASIER,
Pro se.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement	3
Argument	6
Conclusion	10
Appendix	11

Cases:

Blackmar v. *Guerre*, 342 U. S. 512	8
Federal Crop Insurance Corp. v. *Merrill*, 332 U. S. 380	9
Fletcher v. *Veterans Administration*, 103 F. Supp. 654	7, 8
Lynch v. *United States*, 292 U. S. 571	7
New York Technical Institute of Maryland v. *Limburg*, 87 F. Supp. 308	7

Statutes:

Act of March 20, 1933, 48 Stat. 8, Section 5 (38 U. S. C. 705)	2, 6, 7, 11
Act of October 17, 1940, 54 Stat. 1193, Section 11 (38 U. S. C. 11a-2)	2, 6, 7, 11
Independent Offices Appropriation Act, 1950 [Public Law 266, 81st Cong.], 63 Stat. 631, 653	2, 4, 8, 11-12
Servicemen's Readjustment Act of 1944, 58 Stat. 284, 38 U. S. C. 693, *et seq.*, as amended	3
38 U. S. C. Ch. 12A, Reg. 1(a)	7, 10
38 U. S. C. 697(a)	7
38 U. S. C. 701(f)	7

Miscellaneous:

Veterans' Administration Instruction No. 1 of September 8, 1949, 14 F. R. 5593, 38 C.F.R. 21.690	2, 9, 12

Veterans' Administration's embodiment of that Congressional purpose in its subsequent interpretive regulation is manifestly not in excess of its authority to issue rules and regulations designed to carry out the veterans' educational and training programs. See 38 U. S. C. Ch. 12A, Reg. 1(a), Part VIII(9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
MARCUS A. ROWDEN,
Attorneys.

NOVEMBER, 1955.

APPENDIX

1. Section 11 of the Act of October 17, 1940, 54 Stat. 1193, 1197, 38 U.S.C. 11a-2, provides:

> Notwithstanding any other provisions of law, except as provided in section 19 of the World War Veterans' Act, 1924, as amended, and in section 817 of the National Service Life Insurance Act of 1940, the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under this or any other Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions.

2. Section 5 of the Act of March 20, 1933, 48 Stat. 8, 9, 38 U.S.C. 705, provides:

> All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

3. The Independent Offices Appropriation Act, 1950, enacted August 24, 1949 [Public Law 266,

81st Congress], 63 Stat. 631, 653, in pertinent part, provides:

> * * * no part of this appropriation for education and training under title II of the Servicemen's Readjustment Act, as amended, shall be expended subsequent to the effective date of this Act for subsistence allowance or for tuition, fees, or other charges in any of the following situations:
>
> (1) For any veteran for a course in an institution which has been in operation for a period of less than one year immediately prior to the date of enrollment in such course unless such enrollment was prior to the date of this Act;
>
> * * * * *

4. Veterans' Administration Instruction No. 1, September 8, 1949, applying the provisions of Public Law 266, 81st Congress, 14 F.R. 5593, 38 C.F.R. 21,690, in pertinent part, provided:

PROVISIONAL REGULATIONS

Application of the provisions of Public Law 266, 81st Congress, prohibiting expenditure of Government funds for courses of education or training until certain requirements are met—

> * * * * *
>
> (c) *Policy*—(1) Institutions in operation less than one year. * * *
>
> (ii) * * * In determining whether a school has been in operation for a period of

less than one year, the effective date of operation will be the date on which a full schedule of instruction was commenced by the school to a minimum of 25 students for which the school collected tuition. The school must have been in continuous operation under substantially the same ownership and management for a full twelve months period including reasonable vacation and holiday periods and must have provided to a minimum of 25 students during that full twelve months period the course or courses of substantially the same length and character as those offered following the twelve months period.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 388972 894

FILED
NOV 21 1955
HAROLD B. WILLEY, Clerk

In The

Supreme Court of the United States

October Term 1955

No. 466

George H. Brasier, PETITIONER,

V.

United States of America; H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D.C., Ted Martens Chief of Vocational Rehabilitation, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln, Nebraska, Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln, Nebraska, RESPONDENTS.

RESPONSE TO AND BRIEF IN SUPPORT THEREOF TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief of Respondents Freeman B. Decker, Superintendent of Public Instruction; Wayne O. Reed, Former Superintendent of Public Instruction and Otto G. Ruff, Former Superintendent of Veterans Education.

CLARENCE S. BECK, Attorney General
of the State of Nebraska,
ROBERT V. HOAGLAND, Assistant Attorney
General of the State of Nebraska,
Attorneys for Respondents.

INDEX

Subject Index

	Page
Statement of the case	1
Statement of points to be argued and authorities relied on	4
Argument	4
The court had no jurisdiction over this action and inasmuch as this jurisdiction is essential it must be concluded that no claim upon which relief could be granted is stated against the state defendants	4
Conclusion	9

Cases Cited

Fletcher v. Veterans Administration (D.C. Mich.), 103 F. Supp. 654	4, 6
New York Technical Institute of Maryland v. Limberg (D.C. Md.), 87 F. Supp. 308	4, 6

Statutes Cited

Public Law 266, 81st Congress, 63 Statutes at Large 653	4, 5
Title 38 U.S.C.A. Section 11a-z	4, 5
Title 38 U.S.C.A. Section 705	4, 5, 9

In The

Supreme Court of the United States

October Term 1955

No. 466

George H. Brasier, PETITIONER,

V.

United States of America; H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D.C., Ted Martens Chief of Vocational Rehabilitation, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln, Nebraska, Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln, Nebraska, RESPONDENTS.

RESPONSE TO AND BRIEF IN SUPPORT THEREOF TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief of Respondents Freeman B. Decker, Superintendent of Public Instruction; Wayne O. Reed, Former Superintendent of Public Instruction and Otto G. Ruff, Former Superintendent of Veterans Education.

STATEMENT OF THE CASE

There is an action at law by the plaintiff George H. Brasier, the appellant, as owner of the Lincoln Barber

College instituted against the United States of America and certain other Federal defendants connected with Veterans Administration, and the appellees herein who were officers and representatives of the State of Nebraska in the Department of Education.

The gist of the plaintiff's cause of action as is shown by his complaint (Record page 1) and amended and supplemental complaint (Record page 55) and exhibits thereto attached, is that he entered into a contract with the defendants Exhibit A (Record page 6) and Exhibit B (Record page 14) whereby during a period from July 1, 1949 to June 30, 1950, he was to furnish training to eligible veterans for a consideration to be paid to him by the United States of America.

The plaintiff further alleged that the State defendants, these respondents, gave notice of approval of the Lincoln Barber College for offering of a course in barbering to eligible veterans under the Servicemen's Readjustment Act of 1944, as amended.

The plaintiff further alleged the enactment of Public Law 266, 81st Congress. This act set up more stringent requirements for the approval of veterans training courses and pursuant to said law both the federal defendants and state defendants withdrew their approval of the plaintiff's Barber College for veterans training.

The plaintiff further alleged that as a result of the withdrawal of this approval he was damaged in the sum of $10,000 by the federal defendants and in an additional sum of $25,440.00 by the state defendants.

The federal defendants filed a motion to dismiss the complaint upon the grounds that under the provisions

of Title 38, U.S.C.A. Section 11-A-2, Title 38, U.S.C.A. Section 705, Title 28, U.S.C.A. Section 1346(a)(2) and Title 28, U.S.C.A. Section 1346(b) that the court was without jurisdiction to entertain the suit and also upon the ground that under the provisions of Title 28, U.S. C.A. Section 1391(b) venue did not lie in the District of Nebraska (Record page 59).

The state defendants filed a joint motion to dismiss the action upon the grounds that the court had no jurisdiction over the alleged cause of action against the federal defendants and consequently had no jurisdiction to entertain said cause of action against the state defendants, and also upon the ground that the complaint failed to state a claim upon which relief can be granted.

Upon this condition of the pleadings, the court on August 24, 1954, sustained the motion to dismiss of both the federal and state defendants (Record page 41) and it again reaffirmed its position by an order dismissing the amended and supplemental complaint on November 19, 1954 (Record page 63).

This action of the Federal District Court was appealed by the petitioner to the United States Circuit Court of Appeals for the Eighth Circuit, being designated as No. 15,283 therein. This case was duly argued to the Circuit Court. On June 21, 1955, the Circuit Court sustained the opinion of the Honorable John W. Delehant, District Judge. A copy of this opinion is found on page 17 of the petitioner and appellant's petition for writ of certiorari filed herein.

POINT TO BE ARGUED.

The court had no jurisdiction over this action and inasmuch as this jurisdiction is essential it must be concluded that no claim upon which relief could be granted is stated against the state defendants.

Public Law 266, 81st Congress, 63 Statutes at Large 653.

Title 38 U.S.C.A. Section 11a-z.

Title 38 U.S.C.A. Section 705.

Fletcher v. *Veterans Administration* (D.C. Mich.), 103 F. Supp. 654.

New York Technical Institute of Maryland v. *Limberg* (D.C. Md.), 87 F. Supp. 308.

ARGUMENT.

The Court Had No Jurisdiction over this Action and Inasmuch as this Jurisdiction Is Essential It Must Be Concluded that No Claim Upon Which Relief Could Be Granted Is Stated Against the State Defendants.

As is shown by the Record the plaintiff is relying upon a purported contract for the schooling of veterans under the Servicemen's Readjustment Act of 1949 as amended. The contract contained among others the following provisions:

> "It is understood and agreed that the terms of this contract are subject to and will be governed by, Veterans Administration regulations issued pursuant to Public Laws 16 and 346, as amended, and that *any obligation assumed by the Veterans Administration under this contract is limited to the appropriated funds made available therefor.*" (Emphasis Supplied)

The contract seems, therefore, to have contemplated such limitations as might thereafter be introduced into pertinent appropriation Acts and were actually embodied in Public Law 266.

Congress, on August 24, 1949, passed as part of its appropriation for the Servicemen's Readjustment Act, Public Law 266, 63 Statutes at Large 653. The pertinent portions of this act provide:

> "* * * No part of this appropriation for education and training under Title II of the Servicemen's Readjustment Act, as amended, shall be expended subsequent to the effective date of this act for subsistence allowance or for tuition, fees or other charges in any of the following situations:
>
> "(1) For any veteran for a course in an institution which has been in operation for a period of less than one year immediately prior to the date of enrollment in such course unless such enrollment was prior to the date of this Act."

Title 38 U.S.C.A. Section 11a-z is in the following language:

> "Notwithstanding any other provisions of law, except as provided in Sections 445 and 817 of this title, the decisions of the Administrator of Veterans Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions."

Title 38 U.S.C.A. Section 705, provides:

> "All decisions rendered by the Administrator of Veterans Affairs under the provisions of Sections

701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 710 and 721 *of this title or the regulations issued pursuant thereto, shall be final and conclusive upon all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.*" (Emphasis Supplied)

In construing the above statutes in connection with essentially undistinguishable circumstances the various Federal courts have said:

Fletcher v. *Veterans Administration* (D.C. Mich.), 103 F. Supp. 654.

"Congress has vested in the Veterans Administration the exclusive right to determine what disabled veterans are eligible for training, and in what institution, and also the right to withdraw such students. The exercise of this right is not reviewable by a court of the United States as evidenced by Section 5 of Public Law 2, 73rd Congress, March 20, 1933, 38 U.S.C.A., Section 705 which provides as follows: 'All decisions rendered by the Administrator of Veterans' Affairs under the provisions of Sections 701-703, 704, 705, 706, 707-715, 716-721 of this title and Sections 30a, 485 of Title 5 or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.' This statute was incorporated in the Servicemen's Readjustment Act of 1944, Public Law 346, by Section 1500 thereof, 38 U.S.C.A., Section 697. It is applicable to Public Law 16 students because Section 400(a) of Public Law 346 is an amendment to Paragraph VII of Veterans' Regulation No. 1 (a) relating to Public Law trainees. Section 11 of Public Law 866, 76th Congress, 38 U.S.C.A. Section 11a-2, is

also for application in its denial of the right of judicial review of the Administrator's decisions as to questions of both fact and law. New York Technical Institute of Maryland Inc. v. Limburg, D.C., 87 F. Supp. 308.

"To determine the questions of law and fact raised by the claims set forth in Count I of plaintiff's bill of complaint would require this court to invade the exclusive province of the Veterans Administration, and since there is an express statutory prohibition regarding such action on the part of the courts, this court is without jurisdiction to entertain such an action. The motion for summary judgment is hereby granted.

"The ultimate purpose of the claims set forth in Count I is to obtain moneys from the public treasury and this, in effect, constitutes an unauthorized suit against the United States, since the United States cannot be sued without its consent, and for this reason also, this count must be dismissed. New York Technical Institute of Maryland, Inc., v. Limburg, D.C., 87 F. Supp. 308, 313."

New York Technical Institute of Maryland v. *Limberg* (D.C. Md.), 87 F. Supp. 308:

"It is also my view that the provision for educational and vocational training to veterans is in the nature of a gratuity, as are pensions, that may be granted or withheld in the wisdom of Congress. See Barnett v. Hines, 70 App. D.C., 217, 105 F. (2d) 96, certiorari denied 308 U.S. 573, 60 S. Ct. 88, 84 L. Ed. 480; Slocumb v. Gray, D.C., 82 F. Supp. 125; Metropolitan Training Center v. Gray D.C. D.C., Memo. opinion October 14, 1949, Judge McGuire. Such gratuities are, of course, quite different from veterans' contractual rights under war risk insurance policies. Lynch v. United States, 292 U.S. 571, 577, 54 S. Ct. 840, 78 L. Ed. 1434. If, as I think is clearly the case, Section

705 does apply to the educational rights in Section 701(f) the present suit in which plaintiff seeks to review the administrative decision cannot be maintained. Van Horne v. Hines, 74 App. D.C. 214, 122 F. (2d) 207, certiorari denied 314 U.S. 689, 62 S. Ct. 360, 86 L. Ed. 552; Snauffer v. Stimson, 81 U.S. App. D.C. 110, 155 F. (2d) 861; International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. Bradley, D.C. 75 F. Supp. 395. In seeking to establish the right to judicial review the plaintiff here relies largely on Stark v. Wickard, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733. But that case is not pertinent here because in the Act there involved Congress was silent as to judicial review, which is not the situation here.

"Plaintiff's counsel apparently argue that the plaintiff obtained some vested rights under the Servicemen's Act. But this is a misconception. The plaintiff in this case has no greater rights than the veteran himself would have. The benefits are granted by the statute to the veterans and not created for the benefit of the school. There is no obligation upon the Administrator to enter into contracts with schools for unreasonably high rates of tuition, which he does not approve."

In view of the facts set forth in the plaintiff's petition and the statutes above set forth and the Federal authorities interpreting these statutes under similar factual situations as herein presented, we believe that the plaintiff has no vested rights under the Servicemen's Readjustment Act of 1944 as amended. He knew of the limitations which were provided in his alleged contract.

These respondents have just been furnished a copy of the brief of the respondents, the United States, H.

V. Higley, and Ted Martens, and herewith adopts as much thereof as may be applicable to the position of these respondents.

CONCLUSION.

Congress having made the provisions it did in Title 38 U.S.C.A. Section 705, intended that the decisions by the Administrator of Veterans Affairs should be final.

The benefits provided by this Act are gratuities and the plaintiff is in no better position than one of the *direct* beneficiaries of the provisions of the act.

As a result thereof we feel that the district court was correct in holding that it had no jurisdiction.

Respectfully submitted,

CLARENCE S. BECK,
Attorney General,
ROBERT V. HOAGLAND,
Assistant Attorney General,
Attorneys for Respondents,
Freeman B. Decker,
Wayne O. Reed,
Otto G. Ruff.

PROOF OF SERVICE.

Robert V. Hoagland, being first duly sworn on oath deposes and says that he is one of the duly appointed, qualified and acting Assistant Attorneys General of the State of Nebraska. I hereby certify that I served a copy of the within response and brief on the 18th day of November, 1955, upon all of the parties interested herein, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with Air Mail postage attached prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Honorable Donald R. Ross
United States District Attorney
306 Post Office Building
Omaha, Nebraska.

2. On the plaintiff and Petitioner by mailing a copy thereof to his attorney, Herbert W. Baird in the regular mails with postage prepaid to his office address at 138 North 12th Street, Lincoln 8, Nebraska.

ROBERT V. HOAGLAND,
Assistant Attorney General,
State of Nebraska.

Subscribed and sworn to before me this 18th day of November, 1955.

Notary Public
My Commission Expires July 10, 1959.

In The

Supreme Court of the United States

October Term 1955

No. 466

George H. Brasier, PETITIONER,

V.

United States of America; H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D.C., Ted Martens Chief of Vocational Rehabilitation, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln, Nebraska, Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln, Nebraska, RESPONDENTS.

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI.

The petitioner respectfully submits the Court's decision to deny the writ of certiorari herein prayed was erroneous and improvident. Petitioner hereby makes his petition for writ of certiorari in its entirety a part hereof by reference.

1. The relief sought and denied in the Court of Appeals for the Eighth Circuit was upon the grounds that jurisdiction was vested in the District Court and that the controversy could not be finally decided by

any administrative bureau or agency without impairing petitioner's property and procedural rights.

In *St. Joseph Stock Yard Co.* v. *United States*, 298 U. S. 38, 52 (1936), pertaining to administrative bodies of finality of fact-determination, the Court had the following to say:

> "But to say that findings of fact may be made conclusive where constitutional rights of liberty and property are involved, * * * is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safefuards."

2. The petitioner claimed a vested right in his properties based upon contractual relations and considerations that created a property right protected from being taken without compensation.

In *Lynch* v. *United States*, 292 U. S. 571, Justice Brandeis had the following to say:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obliger be a private individual, a State, or the United States, rights against the United States arising out of a contract with it are protected by the Fifth Amendment. When the United States enters into contract relations, its rights and duties therein are governed generally by law applicable to contracts between private individuals."

3. The Congress cannot by statute invest an administrative body with power to deprive an individual of anything in which his right is otherwise protected by the Fifth and Fourteenth Amendments.

In *Crowell* v. *Benson*, 285 U. S. 22, 56-57 (1932), Chief Justice Hughes elaborated in fusing the due process clause of the Fifth Amendment with Article III:

> "* * * whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency * * * for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." To do so, contended the Chief Justice, "Would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system, wherever constitutional rights depend, as not infrequently they do depend, upon the facts, and finality as to the facts becomes in effect finality in law."

4. The Administrator of Veterans Affairs, Washington, D. C. for the purpose of this action was subject to and within the jurisdiction of the District Court for the reason he was functioning there through his agents.

In *Brougham* v. *Blanton Mfg. Co.*, 243 Fed. 503, the court had the following to say:

> "It is first contended by the appellant that no injunction could rightly have been granted against the appellants, because such an injunction could not have been properly granted against the Secretary of Agriculture. In St. Louis Independent Packing Co. v. Hon. David F. Houston, 242 Fed. 337, we recently had occasion to fully examine this question, and following that case we hold that this injunction could properly have been issued against the Secretary of Agriculture, had he been served or appeared, and he not being within the jurisdiction of the court, but having his subordinates there, who, it was alleged, were violating the law

or about to violate it, upon a proper showing an injunction could issue against them."

The most solemn obligation of the Court is to seize and grasp the fundamental fact that one miscarriage of justice is one too many. That our tripartite form of government depend upon the survival of this Nation as a Constitutional Republic founded upon democratic principles, and the failure of the court and its officers in their obligations due the individual in his effort to obtain the full due process of law guaranteed him would be a black mark on the administration of justice.

The petitioner believes this controversy worthy of consideration of the Court for a final and just determination of the cause rather than a summary determination thereof.

Respectfully submitted,

HERBERT W. BAIRD,
138 N. 12th Street,
Lincoln 8, Nebraska,
Attorney for Petitioner.

CERTIFICATE.

Herbert W. Baird, attorney for petitioner, hereby certifies the above is restricted to Rule 58 of the Revised Rules of this Court and is for the purpose of obtaining justice and not for the purpose of delay.

Herbert W. Baird.